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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 26

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, PETITIONER

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

No. 30

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER SAXON

OPINIONS BELOW

The opinion of the court of appeals (R. 454–477) is reported at 323 F. 2d 290. The opinion of the district court (R. 435–438) is reported at 211 F. Supp. 576.

JURISDICTION

The judgments of the court of appeals were entered on August 14, 1963 (R. 478). Timely petitions for rehearing *en banc* were denied on October 17, 1963 (R. 479). The petition for a writ of certiorari in No. 26 was filed on January 15, 1964. By order dated January 9, 1964, the Chief Justice extended the time for filing the petition in No. 30 to and including January 30, 1964 (R. 480). The petition was filed on January 29, 1964, and both petitions were granted, and the cases consolidated, on March 23, 1964 (R. 481; 376 U.S. 948). The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether Federal Reserve Board approval of the acquisition and operation of a new national bank by a bank holding company, given pursuant to the Bank Holding Company Act of 1956, may later be attacked by competitor banks in a separate suit to enjoin the Comptroller of the Currency from authorizing the opening of the new national bank.

2. Whether the opening and operation of a separately chartered national bank by a bank holding company may be enjoined on the ground that the bank is an unlawful branch of another bank.

3. Whether a State prohibition on the opening of national banks owned by bank holding companies is in conflict with the provisions of the National Bank Act.

STATUTES INVOLVED

The pertinent provisions of the statutes and regulation involved are set forth in Appendix A, *infra*, pp. 79–87.

STATEMENT

1. *The Underlying Facts.* The Whitney National Bank of New Orleans (hereafter "Whitney-New Orleans") is a national bank[1] with its main office and numerous branches in the City of New Orelans, which is coextensive with the Parish of Orleans.[2] It is the largest bank in Louisiana. With the expansion of the New Orleans metropolitan area beyond the city limits, the portion of Jefferson Parish adjoining New Orleans on the east bank of the Mississippi River ("East Jefferson Parish") has had a rapid industrial and residential expansion. Prospects for continued growth are excellent, and the need for further banking service is evident (R. 455; R. 67, 70, 100–107, 426).

Many of the residents of East Jefferson Parish have been customers of Whitney-New Orleans and other banks within the city limits. However, State law (La. R.S. § 6:54) prohibits banks from opening branch offices in parishes other than their home parish and these geographical limitations are made applicable to national banks by the Banking Act of 1933 (12 U.S.C.

[1] A national bank is a national banking association organized and operated pursuant to the National Bank Act, 12 U.S.C. 21, *et seq.*

[2] A parish in Louisiana is comparable to a county in other States.

36). The downtown New Orleans banks have been unable, therefore, to follow their customers to East Jefferson Parish by establishing branches there.

In 1955, the majority stockholders of the National Bank of Commerce in New Orleans, Whitney-New Orleans' largest competitor, opened a separately chartered affiliate bank in East Jefferson Parish, the National Bank of Commerce in Jefferson Parish. The two banks were controlled by the same stockholders, with an interlocking set of directors and executive officers (R. 42, 65, 116). Another of Whitney-New Orleans' competitors also acquired a separately chartered affiliate there (R. 42, 90, 116).

Faced with this competition and the statutory prohibition against branch offices beyond its home parish, the management of Whitney-New Orleans considered the two possibilities for opening bank facilities in Jefferson Parish: (1) the establishment of an affiliate, similar to those of its competitors; (2) the establishment of a bank-holding company, which would in turn establish a separately chartered bank in Jefferson Parish (R. 65). In order to assure a continuity of of relationship between the new and old bank, and to avoid any conflict of interest in transactions between the banks, the Whitney management, after discussions with a Deputy Comptroller of the Currency, decided to adopt the latter alternative (R. 455–457; 42–43, 69–70, 71–72).

Whitney-New Orleans then developed a program to establish a holding company (Whitney Holding Corporation); to place the ownership of the bank in the

holding company and the ownership of the holding company in the shareholders of the bank; and, finally, to establish a new bank in Jefferson Parish to be owned by the holding company. This involved several steps (R. 461–462; 112–114):

First, Whitney Holding Corporation would be organized as a Louisiana business corporation, and Whitney-New Orleans would pay in $350,000 of its funds (from undivided profits) in return for 5,600 shares of stock, which it would immediately distribute to its shareholders.

Second, a new national bank, the Crescent City National Bank, was to be organized and chartered under the National Bank Act, and Whitney Holding Corporation would pay in $350,000, in return for ownership of its shares.

Third, Crescent City and Whitney-New Orleans would enter into a merger agreement, whereby Whitney-New Orleans was to be merged into Crescent City under the name of Whitney-New Orleans. Whitney Holding would own the merged banks. Any stockholders of Whitney-New Orleans who dissented from the merger would have the statutory right, under 12 U.S.C. (Supp. II) 215a(d), to have their shares appraised by disinterested appraisers and to receive the appraised value in cash (R. 44, 113).

Fourth, the new Whitney-New Orleans would declare a dividend of $650,000 from its undivided profits to its owner, Whitney Holding Corporation.

Fifth, Whitney-National Bank in Jefferson Parish (hereafter "Whitney-Jefferson") would be organized as a national bank under the National Bank Act, with

Whitney Holding paying in $650,000 as it capital, in return for the stock of Whitney-Jefferson. Whitney Holding would then sell qualifying shares to each director.

The net result would be to establish a holding company, owned by the original stockholders of Whitney-New Orleans, which would in turn own both Whitney-New Orleans and Whitney-Jefferson.

The program required the affirmative vote of stockholders representing more than two-thirds of the stock of Whitney-New Orleans (R. 114). After due notice, shareholders representing over 88 percent of the stock of Whitney-New Orleans approved the plan and none of the shareholders exercised their rights to receive the assessed value of their shares in cash (R. 46, 66, 324–328). The program also required (a) the approval of the Comptroller of the Currency (under the National Bank Act) for the chartering of the new bank [3] and (b) the permission of the Board of Governors of the Federal Reserve System (under the Bank Holding Company Act) for the holding company's acquisition and operation of the new bank in Jefferson Parish.

Whitney-New Orleans planned to have one officer, four directors, and no employees in common with Whitney-Jefferson (R. 388). Whitney-Jefferson was to carry its legal reserve with the Federal Reserve Bank of Atlanta and to subscribe to and purchase capital stock of that institution. Although Whitney-

[3] His approval was also required for the chartering of Crescent City, and its consolidation with Whitney-New Orleans.

Jefferson was to establish correspondent banking relations with Whitney-New Orleans, it was to have its own capital structure, loan limits, vault, books of account, and its own stationery, checks, and forms, none of which would mention Whitney-New Orleans (R. 388–389).

2. *Administrative Proceedings.* On June 28, 1961, Whitney submitted its entire program to the Comptroller of the Currency (R. 380–384). In accordance with usual practice, his examiners carried out a full field investigation over a period of several months and communicated with competitor banks to obtain their views (R. 44). By letter of October 3, 1961, Comptroller Gidney gave his preliminary approval to the program, subject to the Federal Reserve Board's approval, under the Bank Holding Company Act, of the acquisition by Whitney Holding Corporation of the stock of Whitney-New Orleans and of the new bank in Jefferson Parish (R. 46–47).

On July 14, 1961, Whitney Holding Corporation filed an application with the Federal Reserve Board for permission to become a registered bank holding company by acquiring substantially all the stock of Whitney-New Orleans and of the new bank, Whitney-Jefferson (R. 58). Pursuant to the Board's regulations (Regulation Y, Sec. 222.4, 12 C.F.R. 222.4, *infra*, p. 86), notice of the application was published in the Federal Register, and interested persons were invited to submit written views and comments (R. 58; 26 Fed. Reg. 6792). Although three potential competitors of Whitney-Jefferson expressed their opposition, none of the respondents did so.

Pursuant to Section 3(b) of the Bank Holding Company Act (12 U.S.C. 1842(b), *infra,* pp. 81–82), the Board requested the Comptroller's advice as to whether it should approve the Whitney application. The Comptroller recommended approval by letter of October 11, 1961 (R. 44, 166–167). Thereafter, the Federal Reserve Board ordered that a public proceeding be held on January 17, 1962, "to afford further opportunity for the expression of views by interested persons" (R. 58; 26 Fed. Reg. 12312). Notice of the application and hearing was widely publicized in the New Orleans press.[4]

At the hearing before the seven Governors of the Board, testimony and argument were submitted on behalf of the application by Whitney's president and attorney. Testimony and argument in opposition were also submitted by dissident stockholders and potential competitors, but none of the present respondents appeared at the hearing or made their objections known to the Board within the fifteen additional days available for submission of written views or at any time prior to its decision (R. 61–95). On May 3, 1962, the Board approved the Whitney application by a vote of 6 to 1 (R. 97–98, 99–111), but provided that the acquisitions should not be consummated sooner than seven days after that date. No petition for rehearing or reconsideration was filed within that time.

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[4] New Orleans States-Item, December 20, 1961, p. 7; New Orleans Times-Picayune, December 20, 1961, p. 24; New Orleans States-Item January 17, 1962, p. 17; New Orleans Times-Picayune, January 18, 1962, p. 21.

On June 13, 1962, four days after they commenced this action against the Comptroller in the United States District Court for the District of Columbia, two of the present respondent banks (Bank of New Orleans and Trust Company, and Guaranty Bank and Trust Company) filed with the Federal Reserve Board a petition for reconsideration of its decision approving the Whitney application, raising for the first time the claim that the Whitney proposal violated the branch banking laws (R. 167–169). By letter dated June 21, 1962, a third respondent, the State Bank Commissioner, also requested a "new hearing" (R. 165). On June 25, 1962, the Board denied the petition on the grounds that it was untimely and "without substantial merit" (R. 168).

3. *Judicial Proceedings Against the Federal Reserve Board in the Fifth Circuit.* On June 30, 1962, two of the respondent banks petitioned the United States Court of Appeals for the Fifth Circuit for judicial review of the Board's decision under Section 9 of the Bank Holding Company Act (12 U.S.C. 1848, *infra*, p. 84), contending that Whitney-Jefferson would be merely a branch of Whitney-New Orleans, The Louisiana State Bank Commissioner, the third respondent, did not file a timely petition for review but later sought to intervene on their behalf. Although the case has been briefed and argued orally, the Fifth Circuit has withheld decision.[5]

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[5] By order of October 7, 1963, the Fifth Circuit stated that decision would be withheld until final disposition of the "proceedings involving application for a writ of certiorari" in the case at bar.

4. *Judicial Proceedings Against the Comptroller (The Instant Cases).* By May 25, 1962, Whitney-Jefferson was organized as a national bank under the terms of the National Bank Act, and had been recognized as such by the Comptroller (R. 388, 392–394). Its directors and officers had been elected and its employees selected according to its program; its stock was paid in; and it had subscribed to and paid for capital stock of the Federal Reserve Bank of Atlanta (R. 46, 115, 388–389). All that remained to be done to consummate the Whitney program was for the Comptroller to issue a certificate of authority, under the National Bank Act (12 U.S.C. 27, *infra*, pp. 78–79), to permit Whitney-Jefferson to commence the business of banking (R. 46, 115–116).

On June 9, 1962, three State-chartered banks (including respondents Bank of New Orleans and Guaranty Bank and Trust Company), claiming a threat of competitive injury, brought this action in the District of Columbia to restrain the Comptroller from issuing the certificate of authority which would permit Whitney-Jefferson to open for business (R. 16–19).[6]

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[6] The three respondent banks are State-chartered competitors or potential competitors of the Whitney banks which do not have offices in Jefferson Parish. Two have their offices in New Orleans and one in distant Lafayette Parish. One of the three original plaintiffs, which was located in Jefferson Parish, voluntarily withdrew as a party plaintiff. Respondent Bank of Louisiana in New Orleans and the respondent State Bank Commissioner later intervened as parties plaintiff and Whitney-Jefferson intervened as a party defendant (R. 458, n. 6).

The gravamen of the complaint was that Whitney-Jefferson was a branch bank within the meaning of the Banking Act of 1933 (12 U.S.C. 36, *infra*, pp. 79–80), and that its establishment was therefore prohibited by law (R. 6–20). An additional contention, advanced later, was based on the fact that, while the complaint was pending in the district court, the Louisiana legislature enacted Louisiana Act No. 275 of 1962, which purported to render it unlawful for any bank owned or controlled by a bank holding company to open for business whether or not it had received its charter or certificate to engage in the banking business (*infra*, p. 85). The bill was signed by the Governor on July 10, 1962, as "emergency legislation," to become effective immediately (R. 460).

The case was submitted to the district court on cross-motions for summary judgment which relied upon the administrative record and opinions of the Federal Reserve Board, affidavits, and other documents. All parties agreed that there was no genuine dispute of fact; none of them considered the intent of the Whitney management in regard to the operation of Whitney-Jefferson to be material[7] (R. 223-224, 275–293, 307-309, 318–323, 343, 360–366).

[7] The president of Whitney-Jefferson asserted, by affidavit, that Whitney-Jefferson had been recognized as "a newly organized independent bank," and that it would "operate a banking house entirely separate from that of the Whitney-New Orleans" (R. 388). Respondents took issue with these assertions (R. 420–421), but apparently none of the parties regarded the matter as a genuine issue of material fact (R. 431–434).

In a short memorandum opinion (R. 435–438) the district court assumed without discussion that the respondents, as competitor banks, had standing to invoke its jurisdiction. On the merits, the court held that the Bank Holding Company Act of 1956 reserved to, or conferred upon, the States authority to prohibit the operation within their borders of banks owned by holding companies, including national banks; and that Louisiana Act No. 275 of 1962 deprived the Comptroller of the Currency of his authority under the National Bank Act to issue a certificate of authority to the Whitney National Bank in Jefferson Parish (R. 437–438). Accordingly, the court granted the respondents' motion for summary judgment and entered a permanent injunction restraining the Comptroller of the Currency from issuing a Certificate of Authority authorizing the opening of Whitney-Jefferson "in violation of Louisiana Act 275 of 1962" (R. 451).

Both the Comptroller and Whitney-Jefferson appealed. In addition to his arguments on the merits, the Comptroller again urged that the district court lacked jurisdiction because competitor banks do not have standing to challenge the opening of a new national bank and because such banks have an adequate administrative remedy before the Federal Reserve Board with a right to judicial review of the Board's decision.[8] Both appellants called the court's

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[8] Contrary to the suggestion in the opinion below (R. 465), on oral argument counsel for the Comptroller stated to the court that the standing argument was not being waived, but that his position on that issue was set forth fully in the brief, and that he would devote his time on oral argument to the merits.

attention to the review proceedings which were then pending in the Fifth Circuit, and the Comptroller urged that respondents had not exhausted their remedies under the Bank Holding Company Act.

The court of appeals held that the district court had jurisdiction. It ruled that bank charters are the equivalent of semi-exclusive franchises and confer upon their holders a right to be free from the competition of a branch whose operation violates the branch-banking provisions of the Banking Act of 1933, 12 U.S.C. 36 (R. 465–470). On the merits, the court inferred that "Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one" (R. 475), and concluded that Whitney-Jefferson was a branch of Whitney-New Orleans, the operation of which, outside Orleans Parish, was prohibited by the Banking Act of 1933, 12 U.S.C. 36 (R. 470–477). The court found it unnecessary to rule upon the applicability of Louisiana Act 275 of 1962 to national banks.

The Comptroller and Whitney-Jefferson filed timely petitions for rehearing *en banc*. The Comptroller again urged that the district court lacked jurisdiction over the controversy. Apart from the matter of standing, he argued that the decision of the court of appeals was based upon a ground which could and should have been presented to the Federal Reserve Board, and that the consequence of its ruling was to sanction an impermissible collateral attack upon the Board's decision. The petitions for rehearing were denied without opinion on October 17, 1963 (R. 479–480).

SUMMARY OF ARGUMENT

I

The Bank Holding Company Act of 1956 prohibits a bank holding company from acquiring ownership or control of a new or existing national bank without the approval of the Federal Reserve Board. The Act and regulations provide for a full administrative hearing at which competitor banks may present their objections. No other approval is necessary for a holding company to acquire an existing national bank. Since every newly chartered national bank (whether or not owned by a bank holding company) must have the Comptroller's permission to open, a bank holding company must obtain the Comptroller's consent to open a newly chartered national bank even after it has the Federal Reserve Board's consent to acquire the new subsidiary. The Comptroller's decision is made *ex parte* after an informal investigation. The jurisdictional question presented here is whether competitor banks may disregard the established administrative proceedings before the Board and attack the acquisition of a newly chartered national bank by a district court action to enjoin the Comptroller from allowing the bank to open. We submit that Congress plainly intended the Federal Reserve Board (subject, of course, to review in the appropriate Court of Appeals) to be the exclusive tribunal for determining the validity of any objections to the operation of a national bank which are grounded upon its ownership by a bank holding company.

The language and history of the Bank Holding Company Act of 1956 are determinative. Congress re-

jected a House bill that would have authorized the Comptroller to veto a proposed holding company acquisition of a national bank. Its careful decision to make the Board's, and not the Comptroller's, decision final would be overturned if the Comptroller could deny a new national bank permission to open on the very grounds committed to the Board, *i.e.*, its ownership by a bank holding company. Congress also deliberately rejected a scheme of *de novo* district court review of Board decisions which is almost identical to that authorized by the courts below.

Even without this specific legislative history, the fact that Congress established a full and formal administrative proceeding before a tribunal expert in banking would, under established doctrine, require recourse to the Board and the exhaustion of administrative remedies, and would foreclose a collateral attack on the Board's jurisdiction in the federal district courts. Nor could the Board's decision be attacked in any court other than the one the Act makes the exclusive forum for judicial review. *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320. The alternative—an unnecessary and unseemly duplication of actions raising the same issues before different federal agencies to be reviewed on different records by different courts—was never intended by Congress.

Finally, even prior to the enactment of the Bank Holding Company Act in 1956, competitor banks lacked standing to bring a suit to enjoin the Comptroller from permitting a new national bank to open its doors. *A fortiori,* competitors lack such standing

after Congress has provided them with an alternative forum where an acquisition is reviewed with a full administrative hearing.

II

Although the operation of separately chartered banks owned or controlled by a bank holding company, like the operation of one bank with several branches, permits the use of multiple banking offices with common ownership and control, there are substantial differences between bank holding company operations and branch banking. To take but a few examples, the National Bank Act requires each separately chartered bank to have its own capital structure, and lending and borrowing limitations; and capital funds of one bank owned by a holding company may not be transferred directly or indirectly to another bank. In contrast the branches of a single bank share one capital structure, so that the assets of the bank may be freely transferred among its branches, and the lending and borrowing limitations of each branch are the same as the total for the entire bank. Numerous other requirements are imposed upon separately chartered national banks but are wholly absent in branch banking.

In the Banking Act of 1933 Congress made branch banking by national banks subject to the restrictions as to location of branches imposed by State law upon State chartered banks. Sec. 23, 12 U.S.C. 36(c). It deliberately adopted a wholly different method of regulation with regard to separately chartered subsidiaries of bank holding companies, however, because

of its conviction that the two kinds of banking were "entirely different" 76 Cong. Rec. 1998.

Again, in its consideration of the Bank Holding Company Act of 1956, Congress rejected a proposal which have made State law restrictions as to the location of branches applicable to separately chartered banks owned by bank holding companies. It instead chose to impose a wholly distinct set of requirements on bank holding company operations, making no reference to the branch banking limitations of State law because of its view that the two kinds of banking were "vastly different." Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., pp. 10–11; 102 Cong. Rec. 6753–6754.

Congress thus deliberately adopted one set of regulations for branch banking and a wholly different scheme for bank holding company operations, although it was fully aware that the latter allowed bankers to obtain some of the advantages of the former. Congress has chosen to define the rights and obligations of the two different kinds of banking, and to leave private parties free to choose among the alternatives. Even apart from the want of jurisdiction, therefore, the court below erred in subjecting a separately chartered bank to the restrictions imposed on branch offices of a single bank.

III

Louisiana Act 275 of 1962, which prohibits the opening of banks owned by bank holding companies, provides no basis for affirming the decision below. In

the first place, while State law can properly be considered by the Federal Reserve Board, it is plainly irrelevant to the performance of the functions of the Comptroller. His function under the National Bank Act is simply to guarantee and certify the applicant's compliance with the applicable provisions of federal banking law. He is neither authorized to determine, nor required to certify, that a proposed national bank has complied with all of the provisions of State law. 12 U.S.C. 26, 27.

More basically, a State statute prohibiting the opening of a national bank is in conflict with the National Bank Act. The Act constitutes a complete system for the creation of national banks which are to operate as instrumentalities of the federal government to perform vital federal functions. A State may not, by prohibiting the opening of national banks, deny the power and right of Congress to utilize this method of realizing its ends. State laws which merely impair or interfere with the use of national banks to perform their federal purposes are in conflict with that Act and invalid. *Mercantile National Bank at Dallas* v. *Langdeau,* 371 U.S. 555, 558–559; *Franklin National Bank* v. *New York,* 347 U.S. 373. A State is wholly without power to prevent a national bank from commencing the business of banking.

Respondents contend that, even if Louisiana Act 275 would otherwise be unconstitutional, it is saved by Section 7 of the Bank Holding Company Act of 1956. But this section did not confer upon the States any new authority to regulate or control national

banks; it merely preserved their preexisting authority over State chartered banks and bank holding companies. 12 U.S.C. 1846; Sen. Rept. 1095, Part II, 84th Cong., 2d Sess., p. 5. The States, never having had the authority to prevent the opening of national banks, were not granted it by the 1956 Act.

ARGUMENT

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO CONSIDER OBJECTIONS OF COMPETITOR BANKS TO THE OPERATION OF A NATIONAL BANK BY A BANK HOLDING COMPANY

The Bank Holding Company Act of 1956 prohibits a bank holding company from acquiring ownership or control of a new or existing bank without the approval of the Federal Reserve Board. Sec. 3(a), 12 U.S.C. 1842(a), *infra*, p. 81. The Act contemplates a full administrative proceeding in which all interested persons may participate and the views of the interested supervisory authority (the Comptroller of the Currency or the corresponding State banking authority) will be obtained. Sec. 3(b), 12 U.S.C. 1842(b), *infra*, pp. 81-82. The Board's determination is subject only to judicial review by the appropriate court of appeals, which must accept the administrative findings if they are supported by substantial evidence. Sec. 9, 12 U.S.C. 1848, *infra*, p. 84.

The permission of the Comptroller of the Currency under the National Bank Act is necessary in order to open a new national bank. 12 U.S.C. 27, *infra*, pp. 78–

79. Consequently, when a bank holding company intends to acquire a subsidiary which is to be opened as a new national bank, there are two steps, one requiring the approval of the Federal Reserve Board (for the acquisition) and the other that of the Comptroller of the Currency (for the opening). The National Bank Act, however, makes no provision for an administrative hearing or for judicial review, and the Comptroller's decisions are made informally, without an administrative record.

The prinicpal jurisdictional issue presented by this case, therefore, is whether competitor banks must raise, in the established administrative proceedings before the Federal Reserve Board, all objections to the proposed acquisition and operation of a new national bank which are based upon the proposed ownership of the bank by a bank holding company. Respondents contend, and the court below has held, that they may assert such objections—after the Comptroller has recommended to the Board approval of the acquisition and after the Board has authorized it—by a district court action to enjoin the Comptroller from authorizing the opening of the national bank. In our view, any challenge to the acquisition and operation of the new subsidiary which is based upon its ownership by a bank holding company must be presented to the Federal Reserve Board. We submit, moreover, that the Board's decision on these matters is conclusive, subject only to the judicial review in the court of appeals specified by the Bank Holding Company Act.

Only the clearest of statutes or legislative history would warrant the conclusion that Congress intended the propriety of the ownership of a national bank subsidiary by a bank holding company to be the subject of duplicate litigation before several different federal tribunals with different procedures, different standards of review, and different records before them. The resulting waste of the time and energies of the federal courts and administrative agencies, as well as of the parties, would, without more, make such a Congressional purpose unlikely. The possibility of unseemly conflicts—some of them irreconcilable and others amenable to resolution only by this Court—adds to the manifest undesirability of multiple litigation of the same federal issues. That is the inescapable result, however, of allowing the substantive issues to be litigated in a district court, as they were in this case, instead of confining them within the exclusive jurisdiction of the Federal Reserve Board.

Even if the statutory scheme were ambiguous, one would not assume without some compelling reason that Congress intended to authorize multiple litigation which would be, at once, so wasteful of judicial effort and so disruptive of orderly process. Consideration of the applicable federal statutes confirms the conclusion that Congress had no such purpose and that it intended the Federal Reserve Board to be the exclusive forum for litigation of challenges based upon the ownership or operation of a bank subsidiary by a bank holding company.

A. THE OBJECTIONS RAISED BY THE RESPONDENTS TO THE OPENING OF WHITNEY-JEFFERSON ARE BASED UPON ITS OWNERSHIP BY A BANK HOLDING COMPANY AND COULD THEREFORE HAVE BEEN ASSERTED AS GROUNDS FOR DENIAL OF THE FEDERAL RESERVE BOARD'S CONSENT TO THE ACQUISITION OF WHITNEY-JEFFERSON BY WHITNEY HOLDING CORPORATION

The Bank Holding Company Act of 1956 was designed to centralize the regulation and control of bank holding companies in a single federal agency. Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., pp. 8–9, 14; 102 Cong. Rec. 6760. To this end, Congress established the Board as an administrative tribunal where all interested persons and agencies, including competitor banks, could express their views and present any objections to the effects of the combination of banking resources and operations which would result from the proposed acquisition and operation.

1. The Act and the regulations adopted pursuant thereto provide for notice to the appropriate federal or State bank supervisory authority (the Comptroller of the Currency for national banks or State bank commissioners for State-chartered banks), and to the public, with at least a thirty-day period for the filing of views. Sec. 3(b), 12 U.S.C. 1842(b), and 12 C.F.R. 222.4, *infra*, pp. 81–82, 86. The Act requires a full formal hearing in instances where the supervisory authority disapproves the application; directs the Board to "afford all interested parties a reasonable opportunity to testify at such hearing;"[9] and specifies that the

[9] The regulations provide that a party to a proceeding shall be "any person or agency named or admitted as a party or any person who has filed a request in writing to be admitted as a

Board should "grant or deny the application on the basis of the record made at such hearing." Sec. 3(b), 12 U.S.C. 1842(b), *infra,* pp. 81–82. Similarly, where the supervisory authority does not object, the regulations contemplate that the Board may order a hearing, with decision on the record, either upon its own motion or "upon the request of any party in interest." 12 C.F.R. 222.7, *infra,* pp. 86–87. Thus, while the Act does not require a hearing on every application, the Act and regulations make adequate provision for a hearing where the application and the facts on which it is based are disputed,[10] and for the expression of views and participation in the administrative proceedings by all interested parties, including competitor banks and the appropriate bank supervisory authority. As the chief sponsor and manager of the bill explained (102 Cong. Rec. 6752):

> This procedure should afford an opportunity for developing the true merits of each case and also assures adequate recourse to court review for the aggrieved party.

The Bank Holding Act authorizes judicial review of the Board's determination, on petition by "[a]ny party aggrieved," in the court of appeals for the cir-

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party and who is entitled as of right to be admitted." 12 C.F.R. 222.7(c), *infra*, p. 87. The Board regularly admits competitor banks as full parties to the administrative proceedings. See, *e.g.*, *Trans-Nebraska Co.* (F.R.B. Docket No. BHC-66).

[10] The Board has denied applications without a hearing where the applicant holding company has had adequate opportunity to present its evidence and the underlying facts were undisputed. *E.g., First Wisconsin Bankshares Corp.* v. *Board of Governors*, 325 F. 2d 946, 960 (C.A. 7).

cuit wherein that party has its principal place of business, or the Court of Appeals for the District of Columbia Circuit. Such review proceeding must be instituted within sixty days, and the Board's findings of fact are conclusive if supported by substantial evidence. Sec. 9, 12 U.S.C. 1848, *infra*, p. 84.

2. If the opening and operation of Whitney-Jefferson as a national bank were forbidden by the National Bank Act, the Banking Act of 1933, or a valid State law because of its ownership by, or relation to, Whitney Holding Company, the Federal Reserve Board could not properly authorize the acquisition in this case. The Board is charged with a broad responsibility to authorize only such acquisitions as are in the public interest; its approval provides a Federal license to engage in bank holding company operations. In particular, the Bank Holding Company Act of 1956 directs the Board to consider both "the convenience, needs, and welfare of the communities and the area concerned" and "whether or not the effect of such acquisition * * * would be to expand the size or extent of the bank holding company system involved beyond limits consistent with * * * the public interest * * *." 12 U.S.C. 1842(c)(4) and (5). There can be little doubt that this statutory mandate includes a directive to consider, and accept or reject on their merits, all objections to the ownership or control of a national bank by a bank holding company, including those set forth by the respondents in this case. They contend, *first*, and the court below held, that the relationship of Whitney-Jefferson to

the Whitney Holding Corporation and Whitney-New Orleans so closely approximates the relationship of a branch office to the central office of a single bank that the operation of Whitney-Jefferson as a national bank subsidiary in Jefferson parish is prohibited by the restrictions in the federal Banking Act of 1933 relating to the location of branch offices. We believe that the branch banking restrictions are wholly inapplicable to separately chartered subsidiaries of a bank holding company (see *infra*, pp. 40–64), but respondent's contention, if sound, would require the Board to deny Whitney Holding Corporation's application to acquire Whitney-Jefferson. An application to establish a relationship forbidden both by another federal statute and by the State law it incorporates is not consistent with the "welfare of the communities and the area concerned" and would result in expanding the "extent of the bank holding company system involved beyond limits consistent with * * * the public interest." 12 U.S.C. 1842(c)(4) and (5).

Respondents contend, *second*, and the district court held, that the operation of Whitney-Jefferson is prohibited by a valid and applicable State law forbidding the acquisition or opening of holding company subsidiaries. This contention, if sound, would also require the Board to deny its consent to the acquisition under 12 U.S.C. 1842(c)(4) and (5). The Board could not properly authorize the acquisition of a national bank subsidiary if either the acquisition or the subsequent operation of the subsidiary were forbidden by such a valid State law prohibiting holding

company operations. For the State law would then define the public interest which the Board is directed to protect.

Thus, both issues were cognizable by the Federal Reserve Board and the courts on direct review.

B. THE BANK HOLDING COMPANY ACT OF 1956 AND ITS LEGISLATIVE HISTORY ESTABLISH THAT A DECISION OF THE FEDERAL RESERVE BOARD AUTHORIZING AN ACQUISITION WAS NOT TO BE SUBJECT TO LATER REVIEW BY THE COMPTROLLER OR BY A FEDERAL DISTRICT COURT IN A SUIT AGAINST THE COMPTROLLER

The conclusion is irresistible that Congress intended the statutory proceedings before the Federal Reserve Board—and not district court actions against the Comptroller of the Currency—to be the means by which competitor banks could assert objections to the ownership or operation of a subsidiary by a bank holding company. Indeed, in most cases the Board is the only possible forum. The most frequent method by which a bank holding company expands is to acquire a controlling interest in, or all the stock of, an existing national or State-chartered bank which is already operating under independent management and ownership.[11] Since the bank needs no additional certificate or authority from the Comptroller of the Currency (or his State counterpart) to continue its operations under the management and control of the bank holding company, there is no possibility of a suit to enjoin the Comptroller of the Currency (or his State counterpart) from permitting the bank to engage in the business of banking.

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[11] Fischer, *Bank Holding Companies* (1961), p. 111. See, H. Rept. 609, 84th Cong., 1st Sess., p. 14.

There is, of course, no reason why Congress would have wished a different result in the less frequent case where a holding company establishes and acquires a newly formed bank subsidiary. In this situation the consequences of the acquisition are less, not more, substantial, for an existing bank is not withdrawn from independent operation and competition, and its assets are not added to the resources of the holding company. The terms and legislative history of the Bank Holding Company Act establish what common sense suggests: that Congress no more intended multiple litigation of the same issues before two federal agencies when a newly formed subsidiary is established than when an existing bank is acquired.

1. The Bank Holding Company Act provides specifically that the Federal Reserve Board's determination as to the propriety of a holding company's acquisition of a subsidiary shall be binding upon the Comptroller, subject only to the statute's provisions for judicial review of the Board's decision. Section 3(b) of the Act requires the Board to give the Comptroller notice of any proposed acquisition of the shares or assets of a national bank. 12 U.S.C. 1842(b). If the Comptroller disapproves the application, the Board must hold a hearing at the conclusion of which it is authorized to "grant or deny the application" as it sees fit. *Ibid.* An earlier House bill had sought, over objections by the Board, to give the Comptroller (or State bank supervisory authority) the right to deny bank holding company applications, and to make that denial "final." Sec. 5(b), H.R. 6227, 102 Cong. Rec. 8186–8187. H. Rept. 609, 84th Cong., 1st Sess., pp.

14–15. The Senate, however, rejected that approach Although it provided for the expression of views by the Comptroller (or State bank supervisory authority), it gave the Federal Reserve Board the authority to approve such applications, despite the disapproval of the supervisory authority. Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., pp. 8–10; 102 Cong. Rec. 6760. The Senate version became the Bank Holding Company Act. 102 Cong. Rec. 6964, 7161.

Congress thus deliberately rejected a proposal that the Comptroller be empowered to deny bank holding companies permission to acquire national banks. This rejection necessarily carried with it rejection of any claim of power in the Comptroller to deny effect to the Board's decision by refusing to certify a new bank because of its ownership by a bank holding company, *i.e.*, to veto the Board's decision on grounds that were or could have been presented to the Board.

2. If the Comptroller is bound by the decision of the Federal Reserve Board, subject only to judicial review of that decision, he cannot be enjoined to disregard the Board's decision. Indeed, the legislative history of the Bank Holding Company Act establishes that Congress also specifically rejected a proposal for such *de novo* district court review of the Board's decision as is involved in a suit to enjoin the Comptroller from certifying a new national bank on grounds of its ownership by a bank holding company.

The same House bill which would have given the Comptroller the power to overrule the Board's deci-

sion provided that the Board's decision should be subject to judicial review at any time in a district court, with the facts subject to a trial *de novo*. Congress decided otherwise. It made the Board decisions subject to review only in the appropriate court of appeals, directed that the Board's findings must stand unless unsupported by substantial evidence, and required that the review proceeding be instituted by any "party" aggrieved, within sixty days. Compare Sec. 9, 12 U.S.C. 1848 (*infra*, p. 84), and Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., p. 9, and Part II, 84th Cong., 2d Sess., p. 5; with Sec. 9 of H.R. 6227, 101 Cong. Rec. 8187, and H. Rept. 609, 84th Cong., 1st Sess., pp. 22, 25–26.

C. ESTABLISHED PRINCIPLES REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES AND THE USE OF STATUTORY REVIEW PROCEDURES CONFIRM THE VIEW THAT THE PROCEEDINGS AUTHORIZED BY THE BANK HOLDING COMPANY ACT ARE EXCLUSIVE

Congress has charged the Federal Reserve Board with the responsibility for authorizing or forbidding, as the public interest requires, acquisitions by bank holding companies. The detailed procedures it has provided to assure a full and fair administrative hearing before an expert agency and judicial review refute any suggestion that private parties were left free to ignore the proceedings before the Board and to proceed by way of suit in a Federal district court for an injunction against the opening of a national bank on the ground of its ownership by a bank holding company.

1. Congress plainly decided to rest the initial determination as to the propriety of a holding company acquisition in an agency expert in the operations of

the banking system rather than in a Federal district court. The doctrines of primary jurisdiction and exhaustion of administrative remedies have regularly been invoked by this Court to protect such a Congressional determination against collateral attacks in the federal courts.[12] The principle involved in a long line of cases was stated succinctly in *Far East Conference v. United States*, 342 U.S. 570, 574–575:

> * * * in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[13]

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[12] See, *e.g.*, *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426; *United States v. Corrick*, 298 U.S. 435; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48–51; *Aircraft & Diesel Corp. v. Hirsch*, 331 U.S. 752, 767; *Lichter v. United States*, 334 U.S. 742; *Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 512.

[13] The dissent in *Far East Conference* did not reject this principle, but regarded it as inapplicable because the shipper had not invoked the jurisdiction of the Shipping Board by filing the challenged rate schedule. The dissent agreed that "If the rates were filed, of course the Board would have exclu-

The principle is fully applicable to the present case. The court below held that the relationship of Whitney-Jefferson to Whitney Holding Corporation would not be that typically associated with bank subsidiaries and holding companies but would rather approximate the relation of a branch office to a central office of a single bank. Therefore, the court held, the branch-banking restrictions of the Banking Act of 1933 were applicable. But Congress plainly relied on the training and experience of the Federal Reserve Board, not a federal court, to assess the relationship to be established between a proposed subsidiary and a bank holding company. If there were any room for treating a separately chartered subsidiary as a mere branch office—and we submit this is never proper (*infra.*, pp. 40-64)—the determination of this issue would have to be made in the first instance by the Federal Reserve Board, the agency vested by Congress with administrative discretion because of its expertness in the banking field.

Respondents had due notice of the proceedings before the Federal Reserve Board and ample opportunity to express their views (R. 168). To the extent that they did not do so, and failed to become parties to those proceedings,[11] they are precluded from

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sive jurisdiction to pass on them." 342 U.S. at 578. Here, Whitney invoked the jurisdiction of the Federal Reserve Board long before any district court action was initiated.

[11] The respondent Bank of Louisiana in New Orleans did not in any way make its views known to the Board and did not seek review of the Board's decision. The other respondents made their positions known to the Board only after the Board's decision, and are now seeking judicial review of that decision in the Court of Appeals for the Fifth Circuit. See pp. 7-9, *supra*.

raising their objections by their failure to avail themselves of the remedies specified by the Bank Holding Company Act. For a party may not circumvent a Congressional decision to vest exclusive regulatory authority in an administrative agency by refusing to participate in the specified administrative proceedings, and then attacking the administrative determination in a collateral action. *Myers* v. *Bethlehem Shipbuilding Corp., supra*, 303 U.S. 41, 50–51; *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 512; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 501–502.[15]

2. Competitor banks must thus first present to the Federal Reserve Board their objections to the acquisition of a national bank. It is equally clear that the only forum in which they can thereafter attack the Board's decision is the court of appeals authorized by statute to review that decision. This Court's decision in *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, recently confirmed in *Seattle* v. *Beezer*, 376 U.S. 224, is directly in point. Accord, *United States* v. *Corrick*, 298 U.S. 435.

In the *City of Tacoma* case, the city had applied to the Federal Power Commission for a license to build a power project, including two dams, on a tributary of the Columbia River. The State of Washington appeared in the proceedings before the Com-

[15] The pendency of the Fifth Circuit proceedings does not enhance respondent's position, because the doctrine of exhaustion of remedies requires not merely the institution of the remedies specified by Congress, but the pursuit of such remedies to their conclusion. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 767.

mission urging, *inter alia*, that Tacoma, a creature of the State, did not have the capacity under the laws of that State to act under the proposed license. The Commission rejected that contention, and the State petitioned for review to the Ninth Circuit Court of Appeals. While the review proceeding was pending there, suit was filed by taxpayers of Tacoma in a State court attacking the validity of the bonds which Tacoma sought to issue to finance the construction of the project. The plaintiffs alleged that the bonds were invalid because State law did not authorize the City to carry out the project. While the State court action was pending, the Ninth Circuit sustained the F.P.C.'s grant of a license to Tacoma, and its decision became final upon the denial of certiorari. The State courts nevertheless held that the bonds were invalid because the City did not have the capacity under the laws of the State to condemn a State fish hatchery, as would be necessary for the City to construct the proposed dams under the license. 357 U.S. at 332-333.

This Court reversed, holding unanimously that the attacks on the project raised by the taxpayers in the bond validation suit constituted impermissible collateral attacks upon the Commission's decision. The Court held that the method of review specified in the Federal Power Act was exclusive and "necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." 357 U.S. at 336. The Court noted that the specific issue upon which the State courts relied to invalidate the bonds, and thwart

the project, had been raised and determined in the litigation culminating in the approval of the Federal Power Commission's grant of a license, but ruled that "even if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been." 357 U.S. at 339. The Court then held that the decision was binding not only upon the State, which had appeared before the Commission and in the specified review proceeding, but also upon its citizens, whom it represented. 357 U.S. at 340–341.

In the case at bar, as in *City of Tacoma* v. *Taxpayers of Tacoma*, those who attack the proposed action purport to attack the execution of the proposal, instead of directly attacking the license. Again, as in that case, the attack is based upon an issue which was or should have been raised before the agency and in the direct review proceedings (pending before the Fifth Circuit) specified by the applicable statute.[16] While the Federal Power Act, unlike the Bank Holding Company Act, provides expressly that the statutory mode of review is exclusive, the legislative history of the Bank Holding

[16] Here, no less than in the *City of Tacoma* case and *Seattle* v. *Beezer*, *supra*, the parties were represented before the federal agency, although they did not appear personally. In *City of Tacoma* the Court held that the State had represented the taxpayer-plaintiffs; in *Seattle*, it was the city-licensee. Here the respondents were asserting rights under the branch banking provisions of the Banking Act of 1933—a statute administered by the Comptroller of the Currency. The Comptroller is made a necessary participant to Board proceedings involving national banks and he represents, in these proceedings, any interests arguably protected by statutes he administers. At any rate, respondents had notice and ample opportunity to express their views to the Board. See *supra*, pp. 31–32.

Company Act establishes no less conclusively that Congress deliberately rejected any scheme of *de novo* review in the district courts (*supra*, pp. 28–29). Thus, here, as in the *City of Tacoma* case, the collateral attack upon the agency's decision is impermissible.

Insofar as respondents have presented their contentions to the Federal Reserve Board, they are bound by the decision of the agency, unless and until that decision is overturned in the judicial review proceedings specified by the Act. Insofar as respondents did not avail themselves of the administrative and judicial remedies prescribed by that Act, they are precluded from obtaining judicial relief in this collateral proceeding by their failure to exhaust those remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48–51; *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 512; *United States* v. *Corrick*, 298 U.S. 435.

3. The doctrines requiring exhaustion of administrative remedies and limiting judicial review to the statutory method are designed to effectuate the intent of Congress in enacting a complete and detailed regulatory scheme such as that found in the Bank Holding Company Act of 1956. Respect for these doctrines is no less necessary in order to avoid the consequences of duplicative and conflicting litigation.

If the legality of a holding company's ownership or operation of a subsidiary could be challenged by a suit to enjoin the Comptroller from authorizing the opening of the subsidiary for business, multiple and piecemeal litigation would result. Often (as in this case) some competitors would challenge the holding

company's plan before the Federal Reserve Board, while others would reserve their contentions for presentation to a district court in the event the Board's decision was unfavorable. Alternatively, litigation of the same issues in the two tribunals might take place concurrently. In either event, duplicative litigation would impose wholly unnecessary burdens of expense and delay upon the governmental and private parties, the Federal Reserve Board, and the courts.

Litigation of the propriety of a holding company acquisition before both a district court and the Board would, moreover, result in conflicting determinations as unseemly as they are unnecessary. The facts found on a record made before a district court might differ from those found by the Federal Reserve Board on a different record. The conflict would be confounded if, as might well be the case, both sets of findings were supported by substantial evidence. Similarly, conflicts as to the application of federal law to the same transaction would develop where two different courts of appeals were called upon to review the same transaction—one on review of the Board's decision; the other on review of the district court's decision. Far from endorsing such a result, the scheme adopted by Congress carefully avoids it.

D. COMPETITORS LACK STANDING TO CHALLENGE THE COMPTROLLER'S APPROVAL OF THE OPENING OF A NEW NATIONAL BANK

We have shown that the Bank Holding Company Act of 1956 makes the Federal Reserve Board the exclusive tribunal for litigation of challenges to the acquisition or operation of a national bank based on

its ownership by a bank holding company. It is noteworthy, in addition, that even before the enactment of the 1956 statute, competitors lacked standing to present such challenges in a suit to enjoin the Comptroller of the Currency from authorizing the opening of a new national bank under the National Bank Act. Prior to this case no district court had entertained a suit by a competitor bank to enjoin the issuance by the Comptroller of a certificate to commence business as a new national bank under the National Bank Act.[17] We believe the district court was demonstrably wrong in entertaining this action.

The claims of three respondents are grounded upon loss of business and profits which might result if the new national bank begins to engage in the business of banking in Jefferson Parish (R. 6, 16–19, 170–172).[18] The Comptroller has not undertaken to regulate them; they have not been ordered to forego any of their activities; and they have not been subjected to any obligation or duty. The Comptroller's action does not deprive them of any property, contract, or statutory right.

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[17] One other court of appeals has—we believe erroneously—entertained suits by competitors challenging the certification of a new branch office under the Banking Act of 1933. See, *e.g.*, *Gidney* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830.

[18] The fourth respondent, the State Bank Commissioner of Louisiana, lacks even this interest as a ground of standing. He sues apparently for the benefit of all banks in Louisiana (R. 346–347). But it is by now settled that, in the absence of a statutory grant of standing, the States and their officials do not have standing to challenge the proposed actions of federal officials as *parens patriae* on behalf of their citizens. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485–486; *Florida* v. *Mellon*, 273 U.S. 12, 16–17.

The National Bank Act, upon which the respondents apparently base their causes of action, does not grant competitors a statutory right to be free of competition. They are subject to the competition of all State banks and of as many additional banks as the Comptroller certifies under the National Bank Act. Nor does the Act grant competitors a judicially enforceable right to be free of the competition of banks improperly certified by the Comptroller. If Congress had intended to grant such a right, it would have authorized competitors to present their objections to the Comptroller, for that is where the alleged right would first have to be asserted. But every indication in the National Bank Act is to the contrary. There is, for example, no provision for an administrative hearing and no authorization for competitors to appear before the Comptroller; his decisions are made *ex parte* after his own informal investigation.[19] There are, moreover, no statutory provisions for judicial review; indeed there is no administrative record of the evidence and arguments upon which the Comptroller bases his action. In short, the purpose of requiring applicants to obtain a certificate authorizing the opening of a new national bank was to provide an informal administrative check on an applicant's qualification for a federal charter, not to provide a forum where competitors could protect an alleged right to be free of unauthorized competition.

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[19] Similarly, no administrative hearing is conducted when the Comptroller authorizes the opening of a new branch office. But see, *First National Bank of Smithfield* v. *Saxon*, Civ. No. 1460, Eastern District of North Carolina, decided August 10, 1964, holding that a hearing must be given to competitors objecting to a proposed branch office of a national bank.

Unless those engaged in a business have a statutory, contract, or property right to be free of competition, they have no standing to challenge an administrative action which simply increases the amount or effectiveness of competition. *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 470, 479–483; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137–144. Any economic disadvantage to them as a result of the government's action in increasing competition is *damnum absque injuria*, and is not the kind of damage which permits an action at law or in equity. *Ibid*; *Singer & Sons* v. *Union Pacific R. Co.*, 311 U.S. 295.

In *Tennessee Electric Power Co.* v. *TVA*, *supra*, private electric power companies brought suit against the Tennessee Valley Authority, and three of its officers and directors, to enjoin them from selling electricity to their competitors, municipal corporations and rural cooperatives, on the ground that the unconstitutionality of the statute upon which they acted rendered their actions unlawful. This Court held that the private power companies had no right to be free from competition, and that they had no standing to challenge the "grant of power the exercise of which results in competition." 306 U.S. at 139. In rejecting the contention that a competitor has standing to challenge unlawful competition, the Court ruled (306 U.S. at 140):

> If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of power

> to it, or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue.

The holding of *Tennessee Electric Power* bars respondents' claim of standing in the present case.[20]

II

THE BRANCH-BANKING RESTRICTIONS OF THE BANKING ACT OF 1933 ARE NOT APPLICABLE TO SEPARATELY CHARTERED BANKS OWNED BY A BANK HOLDING COMPANY

As we have shown above, the district court did not have jurisdiction to entertain this action, because the Bank Holding Company Act makes the Federal Reserve Board the forum for the resolution of objections to the ownership and operation of banks by bank holding companies. This jurisdictional ground is, we believe, dispositive of the case and requires reversal of the judgment below. But the judgment below must be reversed even if the merits are reached.

[20] The court of appeals relied upon this Court's earlier decision in *Frost* v. *Corporation Commission*, 278 U.S. 515 (Justices Brandeis, Holmes, and Stone dissenting on the issue of standing), believing that decision "sufficiently similar to be dispositive of the question of standing" (R. 468–469). In *Tennessee Electric Power*, the Court distinguished *Frost* as a case involving discrimination by a State in violation of the Fourteenth Amendment. 306 U.S. at 143. Here, as in *Tennessee Electric Power*, there is no issue of discrimination by a State in possible violation of the equal protection clause of the Fourteenth Amendment. Moreover, in the twenty-five years since the decision in *Tennessee Electric Power*, the *Frost* case apparently has not been cited with approval by this Court.

Regardless of the proper forum for determining the issue, the court below erred in applying State restrictions on the location of branch offices of a single bank to a separately chartered bank owned by a bank holding company. In enacting the Banking Act of 1933 and the Bank Holding Company Act of 1956, Congress intended to regulate branch banking separately and differently from the operations of holding companies. It specifically refused to make State geographical limitations on branch offices applicable to separately chartered banks owned or controlled by bank holding companies.

A. CONGRESS HAS LONG RECOGNIZED THE SUBSTANTIAL DIFFERENCES BETWEEN BRANCH BANKING AND THE OPERATIONS OF A BANK HOLDING COMPANY SYSTEM

1. Although multiple-unit banking systems had played an important role in American banking prior to the Civil War, that war and the National Bank Act itself encouraged the growth of independent (unit) banks, which became virtually the only form of banking in the United States in the second half of the Nineteenth Century. However, between the 1890's and the 1930's multiple unit banking of three distinct kinds grew rapidly in size and importance. One form was branch banking, a system of multiple unit banking in which each unit is merely an office of a single bank. All the units together constitute a single corporation, with a common capital structure, and identical management, officers, board of directors, and owners. A second, holding company banking, usually

called "group" banking, is a form of multiple unit banking consisting of separately chartered banks, owned or controlled by a corporation (bank holding company). Each bank retains a separate capital structure, organization, and name, and each has its own officers and directors. The third, "chain" banking consists of separately chartered banks which are owned or controlled by the same persons, but not by a single bank holding company.

Branch banking is frequently combined with chain banking and bank holding company operations; this occurs when separately chartered banks, owned or controlled by the same corporations or persons, themselves have branches.[21] The definitions of the three kinds of multiple unit banking, and the differences among them, had become settled among bankers, regulatory agencies, and other persons knowledgeable in the field by the early 1930's, and remain so today.[22]

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[21] In this case, for example, Whitney-New Orleans has eleven branches in New Orleans in addition to its main office (R. 101–102), and Whitney-Jefferson itself applied for the establishment of a branch in addition to its main office (R. 102–103). Similarly, its largest competitor, the National Bank of Commerce in New Orleans, and its affiliate, the National Bank of Commerce in Jefferson Parish, have branches (R. 65, 105–106).

[22] *E.g.*, Hearings before the House Committee on Banking and Currency on "Branch, Chain and Group Banking," 71st Cong., 2d Sess. Cartinhour, *Branch, Group and Chain Banking* (1931), pp. 54–60; Chapman, *Concentration of Banking* (1934), pp. 322–364; Fordham, *Branch Banks as Separate Entities*, 31 Col. L. Rev. 975, 976 (1931); Ostrolenk, *The Economics of Branch Banking* (1930); Willit, *Selected Articles on Chain, Group and Branch Banking* (1930); pp. 54–59; Chapman and Westerfield, *Branch Banking* (1942); Lamb, *Group Banking* (1961); Fischer, *Bank Holding Companies* (1961).

2. As noted above, group banking and chain banking involve common ownership or control of separately chartered banks. However, irrespective of ownership or control, each separately chartered bank has its own capital structure, which is separate from those of all other banks; on the other hand, all the branches of a bank have but one capital structure. Again, each separately chartered bank has its own deposits which are its liability alone, and from which it can make loans only to its own customers. In contrast, all the deposits of all the branches of a single bank are the liability of the bank, and the funds received are effectively pooled, so that all are available for investment or loan at the main office or at any branch.

The National Bank Act, like most State banking laws, imposes significant requirements on separately chartered national banks which are not imposed on the branch offices of a single bank. The Act requires each separately chartered national bank to have its capital stock promptly paid in, and prohibits the withdrawal of any portion of that capital in the form of dividends or otherwise. R.S. §§ 5138, 5140 and 5204, 12 U.S.C. 51, 53 (Supp. I) and 56. If the stock is not fully paid in, or if the capital stock has been impaired by losses or otherwise, the shareholders are liable for the deficiency *pro rata*. R.S. § 5205, 12 U.S.C. 55. Thus, each such bank must maintain its capital structure independently, regardless of its ownership by a holding company. Transfers of capital funds from one bank owned by a bank holding company to another are prohibited. In contrast, because

the branch offices of a single bank share a common capital structure, the sufficiency of its capital is measured by reference to the aggregate resources of all the offices (12 U.S.C. 36(d)), and the deposits of one branch may be withdrawn and transferred to the main office or another branch at will.

The National Bank Act imposes stringent lending and borrowing limitations upon a separately chartered bank, based upon its own capital and surplus, and wholly unrelated to the capital of affiliated banks.[23] R.S. §§ 5200 and 5202, 12 U.S.C. 84, 82. Because there is one capital structure for all the banking offices of a single bank, however, the lending and borrowing limitations of each branch are those of the bank. *Ibid.*

The National Bank Act also imposes upon separately chartered banks requirements with regard to corporate organization, composition of boards of directors and management, and termination of operations. These requirements are wholly absent in branch banking. For example, the National Bank Act requires the affairs of each separately chartered national bank to be managed by a board of directors, at least two-thirds of whom must be residents of the State in which the bank is located or within 100 miles

[23] Of course, a separately chartered bank may enter into correspondent relations with other banks to participate jointly in loans which are in excess of the individual bank's loan limit. But such relationship may exist between independently owned and operated banks, as well as between banks owned or controlled by the same bank holding company or individuals.

of the bank, and each of whom must own in his own right shares of stock the par value of which shall not be less than $1,000. R.S. §§ 5145, 5146, 12 U.S.C. 71, 72. The Act also imposes personal and individual liability upon the directors for all damages which may result from violations of the Act. R.S. § 5239, 12 U.S.C. 93. In this way management of each separately chartered bank, regardless of its ownership, is vested in a board of directors which is largely local in character and whose members have a personal stake in the ownership of the bank and personal responsibility if it is mismanaged. By contrast, because all of the branches of a bank are parts of one legal entity, there is only one board of directors, and one set of officers for the entire bank. There is no requirement that the persons managing a branch have a personal interest in the bank or personal responsibility in the event of its mismanagement. Similarly, the National Bank Act requires each separately chartered bank to give notice to the Comptroller prior to winding up its affairs; to publish such notice for two months in the local press in order to permit the assertion of claims against it; and to allow the Comptroller to examine the bank at any time, until the claims of all creditors are satisfied. R.S. §§ 5220, 5221, 12 U.S.C. 181, 182. Again in contrast, an unprofitable branch may be closed at any time by transmitting to the Comptroller a simple resolution of the bank's board of directors (or stockholders in a few cases) along with the Comptroller's certificate authorizing the branch.

B. IN ENACTING THE BANKING ACT OF 1933 AND THE BANK HOLDING COMPANY ACT, CONGRESS DELIBERATELY CHOSE TO MAKE THE GEOGRAPHICAL RESTRICTIONS ON BRANCH BANKING INAPPLICABLE TO SEPARATELY CHARTERED BANKS OWNED OR CONTROLLED BY BANK HOLDING COMPANIES

There are, to be sure, similarities as well as differences between the operation of one bank with several branches and the operation of separately chartered banks owned or controlled by a bank holding company or a person or group of persons. Each form of operation permits multiple banking offices, with common ownership and/or common control. Indeed, the organization and operation of bank holding companies is often motivated by a desire to avoid some of the legislative restrictions imposed upon branch banking.[24] Nevertheless, as we have shown above, the differences between branch banking and banking through separately chartered banks which are subject to common ownership and control are both real and substantial.

The similarities between the three kinds of multiple unit banking might well have been thought sufficient to justify a statute which treated them alike, and regulated (or limited) their growth or expansion in the same way. But, equally plainly, the differences justify a leglislative determination to regulate them

[24] See Fischer, *Bank Holding Companies* (1961), pp. 23, 138; Comptroller of the Currency, *Annual Report*, 1929, pp. 4–5. The fact that group banking continues to thrive in States like California, which have long permitted the establishment of branches without geographical restrictions, suggests however that there also are inherent advantages in group banking. See, Lamb, *Group Banking* (1961), pp. 144–169.

differently. Policy judgments pertaining to the regulation of the economy, such as the degree to which single unit or multiple unit banking should be encouraged or discouraged, and the kind and method of regulation appropriate to the several kinds of banking, are unquestionably matters for the legislature.

Congress, after extensive study and consideration of the various kinds of multiple unit banking, decided, in the Banking Act of 1933 and again in the Bank Holding Company Act of 1956, to regulate the operations of bank holding companies in a manner entirely different from branch banking. In particular, those Acts embody a deliberate Congressional decision to make the geographical limitations on the location of branch offices inapplicable to separately chartered banks owned by bank holding companies. The court of appeals below erred in applying these limitations to the separately chartered bank involved in this case.

1. *The Banking Act of 1933.* The National Bank Act, as recast in 1864, provided for the doing of business only at the "place" and "office" specified in the articles of the association.[25] Consequently, the Comptroller of the Currency and other federal authorities consistently interpreted the Act, at least until 1922, as authorizing a national bank to do business in no more than one office, and therefore as prohibiting branch banking for national banks.[26] This Court agreed with that interpretation.[27]

[25] R.S. §§ 5134, 5190.

[26] Chapman, *Concentration of Banking*, pp. 110-111.

[27] *First National Bank of St. Louis v. Missouri*, 263 U.S. 640.

As a result of the rapid growth of branch banking among State-chartered banks in the early 1900's, national banks were at a competitive disadvantage in States which permitted branch banking. Federal authorities and organizations of national bankers consequently pressed for an amendment authorizing the establishment of branches of national banks. After a legislative struggle lasting several years, Congress, in 1927, adopted the McFadden Act,[28] which authorized national banks to establish branches in the city of the parent bank if State law permitted State banks to operate branches.[29] The 1927 Act left multiple unit banking by separately chartered banks wholly unregulated.

When the host of bank failures in the period 1929–1933 revealed the need for further bank reform, the banking committees of both houses of Congress conducted extensive investigations and hearings into the national bank and Federal reserve systems, and into the various kinds of multiple unit banking.[30] Finally, in 1933, Congress, under the leadership of Senator Glass of Virginia, adopted a comprehensive bank reform statute known as the Glass-Steagall Act or the Banking Act of 1933. Act of June 16, 1933, c. 89, 48 Stat. 162. Among the twenty-five relatively distinct topics covered by the Act were the subjects of branch, chain, and group banking.

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[28] Willit, *Selected Articles on Chain, Group and Branch Banking* (1930), p. 10; Chapman and Westerfield, *Branch Banking*, pp. 84–107.

[29] Sec. 7(c), 44 Stat. 1228.

[30] Sen. Rept. 77, 73d Cong., 1st Sess., pp. 1–2; Hearings before the House Committee on Banking and Currency on "Branch, Chain and Group Banking", 71st Cong., 2d Sess.

The Act provided separate definitions for each of the three kinds of multiple unit banking. Thus, it dealt with chain banking by defining the term "affiliate" of a bank member of the Federal Reserve System to include any bank (national or State) of which control was exercised by the shareholders of a member bank, or of which a majority of directors are directors of the member bank. Sec. 2, 12 U.S.C. 221a(b). Similarly, a "holding company affiliate" was defined to include any corporation which owned or controlled a member bank. Sec. 2, 12 U.S.C. 221a(c). On the other hand, the definition of branch, to include "any branch bank, branch office, branch agency, additional office or any branch place of business" was left as it had appeared in the McFadden Act. Sec. 23, 12 U.S.C. 36(f), *infra*, p. 80.

The Banking Act of 1933 broadened the authority of national banks to engage in branch banking by authorizing the establishment of branches at any point within the State in which the national bank is located, if State law affirmatively authorizes the establishment of branches by State-chartered banks. But the establishment of branches of national banks was to be "subject to the restrictions as to location imposed by the law of the State on State banks." Sec. 23, 12 U.S.C. 36(c), *infra*, p. 79. The Act retained standards for the minimum capital necessary to establish a new branch of a national bank, and the provision that no branch of a national bank was to be established or moved without first obtaining the consent and approval of the Comptroller of the Currency. 12 U.S.C. 36 (d) and (e), *infra*, p. 80.

In regard to the other forms of multiple unit banking, Congress, in the Banking Act of 1933, chose discrete means of regulation. The Act contained provisions controlling loans to or from affiliates, prohibiting member banks from being affiliated with security underwriters, requiring reports from banks which were affiliates of national banks, and authorizing the examination of affiliates of national banks. Secs. 13, 20, 27, and 28, 12 U.S.C. 371c, 377, 161, 481. Since each of the provisions applied to affiliates, they applied alike to chain and group banks.

One provision of the Act applied only to holding companies. In order to obtain the privilege of voting stock it owned in national banks, a bank holding company was required to agree (1) to own readily marketable assets other than bank stock, in an amount equal to 25% of the aggregate par value of its bank stock, (2) to be examined by federal authorities, and (3) to divest itself of ownership of securities companies. Sec. 19, 12 U.S.C. 61. The Board of Governors of the Federal Reserve Board was authorized to grant or withhold permission to vote the national bank stock "as the public interest may require," considering such factors as the financial condition of the holding company and the general character of its management. *Ibid.* Holding companies which owned or controlled State member banks were required to agree to the same conditions and limitations. Sec. 5(c), 12 U.S.C. 337.

Despite these detailed regulatory provisions, the Act did not attempt in any way to prohibit or limit

the expansion of multiple unit banking through holding companies or chains.

That Congress deliberately chose to regulate branch banking separately and differently from the operations of holding companies or chains is fully confirmed by the legislative history of the Act. The committee reports made it clear that the different kinds of multiple unit banking were to be accorded different treatment. Sen. Rept. 77, 73d Cong., 1st Sess., pp. 9–11, 15–17; H. Rept. 150, 73d Cong., 1st Sess., pp. 3–4. Indeed, the distinctions between branch banking on the one hand, and chain and group banking on the other, was so generally recognized and accepted that Senator Glass, the chief author and sponsor of the Banking Act of 1933,[31] made the following statement on the floor of the Senate a few months before its enactment:

> Mr. President: There may now be established chain and group banking systems. There are many such systems. I am not addressing myself to anybody whose confusion of mind is such that he can not differentiate a chain and group banking system from a branch banking system. They are, of course, entirely different.[32]

2. *The Bank Holding Company Act of 1956.* Since the Banking Act of 1933 made no effort to prevent the expansion of group and chain banking,

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[31] 102 Cong. Rec. 6750; 77 Cong. Rec. 5861, 5863, 5892.

[32] 76 Cong. Rec. 1998. The statement was made in debate in regard to a bill very similar to the bill which became the Banking Act of 1933. 77 Cong. Rec. 5892.

and since it applied primarily to national banks and banks in the Federal Reserve System, its provisions were deemed inadequate by some bankers and by the federal officials concerned. From 1938 through 1955 repeated persistent efforts were made to enact legislation providing more extensive regulation of bank holding companies.[33] Beginning in the early 1950's, the Board of Governors of the Federal Reserve System recommended legislation to meet two major problems in bank holding company operations. The first was the unrestricted ability of holding companies to expand their operations. The Board was particularly concerned with the problem of monopoly—that the commercial banking facilities in an area might be concentrated under the control of a single holding company. The second problem involved participation by bank holding companies in enterprises unrelated to banking. The Board advocated legislation necessary to meet these two problems, and the Comptroller of the Currency made similar recommendations.[34] As finally enacted, the Bank Holding Company Act of 1956, largely embodied the suggestions of the Board and the Comptroller.[35]

It is important to note, however, that other proposals were afoot. In 1955 the House Committee on Banking and Currency had recommended a bill advocated by organizations representing single unit

[33] Sen. Rept. 1095, Part I, pp. 3–4.

[34] *Id.* at 194.

[35] Act of May 9, 1956, c. 240, 70 Stat. 133. See Sen. Rept. 1095, Part I, 84th Cong., 1st Sess., p. 2.

banks—one premised on the view that "Our national banking policy has aimed at protecting and fostering the growth of independent unit banks." H. Rept. 609, 84th Cong., 1st Sess., p. 2. The committee expressed its belief that bank holding companies thwart that national policy, circumvent State banking laws pertaining to branch banking, and are not conducive to economic development. *Id.,* pp. 1–2, 2–6. While recognizing that there were differences between "branches and affiliated, or subsidiary banks," the committee believed that they were "differences without a distinction," and that "the holding company device" permits the acquisition of control of banks which "can thereafter be operated, in effect, as branches." *Id.* at p. 3. Accordingly, it recommended passage of a bill which would "base holding company legislation on [State] branch banking law." *Ibid.*

Section 5 of the committee's bill required denial of any application by a bank holding company to acquire control or ownership of a bank (whether State or national), unless it was within the geographical area in which branches of State banks were permitted by State law, or unless the State law expressly authorized such acquisitions. 101 Cong. Rec. 8187. As the House report noted (H. Rept. 609, 84th Cong., 1st Sess., p. 15):

> Section 5 further provides that * * * applications within the home State could be approved only within the area within which branches of banks are permitted or where by State statute

such expansion is specifically exempted from branch banking restrictions.

The essence of section 5, your committee believes, is the placing of bank holding company expansion on the same basis as expansion in offices of banks. It establishes equity between holding companies and banks as to the area in which they can expand. * * *

In short, the House Committee bill equated branch banking and holding-company banking, and provided that the State geographical limitations of branch banking should apply to bank holding company operations.

The Federal Reserve Board, the Comptroller of the Currency, and the American Bankers Association were all emphatically opposed to the provision of the House bill which applied the geographical limitations imposed by State law on branch banking to the expansion of bank holding companies. 102 Cong. Rec. 6754. Because of the opposition to this and other provisions of the House bill, the Senate Banking Committee, in consultation with the interested agencies and banking organizations, completely rewrote many provisions of the House bill, and formulated "a compromise bill." 102 Cong. Rec. 6760.

The Senate bill provided for review of each proposal for the expansion of bank holding companies on its merits, in accordance with specified statutory factors, particularly "the prevention of undue concentration of control in the banking field." Sen. Rept. 1095, Part I, *supra*, p. 10. It centralized the authority to make such decisions in the Federal Reserve Board, subject only to the judicial review it specified. *Id.*,

pp. 8–9, 102 Cong. Rec. 6760. In particular, the Senate Committee expressly rejected the provision of the House bill which would have made State geographical limitations against branch banking applicable to the acquisition of national banks by bank holding companies. It believed that federal authorities, rather than State law, should determine whether it is in the public interest for a bank holding company to acquire ownership or control. As the Senate report stated (Sen. Rept. 1095, Part 1, 84th Cong., 1st Sess., pp. 10–11):

> * * * the bill should contain no provision leaving solely to State control determination of the question as to whether a bank holding company can acquire an interest in a national bank. *If our dual banking system is to operate as a truly dual system, the Federal authorities ought not to surrender their supervisory authority over national banks to State decision.* This is not to say the Federal authorities ought not to consider carefully the views of State authorities regarding the management and control of national banks, *but the ultimate determination of public interest in the national bank system should rest with the appropriate Federal authorities.* [Emphasis added.]

The Senate Committee agreed with the American Bankers Association that the House's approach represented "an attempt to regulate two dissimilar types of organization by laws designed specifically to apply only to one; that is, branch banking." 102 Cong. Rec. 6754. It stated (Sen. Rept. 1095, Part 1, 84th Cong., 1st Sess., p. 11):

> The committee decided against inclusion of a provision in the bill that would automatically

> apply State laws concerning branch banking to bank holding company operations. The purposes of branch banking laws are not identical with the purpose of this bill to control bank holding companies. * * * It is believed the bill contains adequate provisions to regulate bank holding company operations without an arbitrary tiein with branch banking laws.

On the floor of the Senate, Senator Robertson, the sponsor and manager of the Senate bill, explained his views and those of his committee even more explicitly (102 Cong. Rec. 6753):

> The committee also decided against the inclusion of a provision in the bill which would automatically apply State laws concerning branch banking to bank-holding company operations. This provision was contained in the House bill and was advocated by the Independent Bankers Association. *A bank branch is, by form, ownership, and functions, vastly different from a bank-holding company affiliate.* [Emphasis added.]

Senator Robertson then inserted into the Congressional Record a chart setting forth the many differences between a separately chartered bank affiliated with a bank-holding company and a branch of a single bank. 102 Cong. Rec. 6753–6754.[36]

The compromise bill formulated by the Senate Committee, and modified by it over a summer recess (Sen. Rept. 1095, Part II, 84th Cong., 2d Sess.), met with the approval of the Federal Reserve Board, the American Bankers Association, and representatives of

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[36] For the convenience of the Court, we have set forth the chart, *infra*, pp. 88–91.

bank holding companies. 102 Cong. Rec. 6760. And when the Senate Committee bill was amended by the so-called Douglas amendment (discussed, *infra*, p. 58), so as to prohibit acquisitions of banks by out-of-State holding companies without the express authorization of State law (Sec. 3(d), 12 U.S.C. 1842(d), *infra*, p. 83), the Senate bill became acceptable to the representatives of single unit banks, such as the Independent Bankers Association, which had been the chief advocate of the House bill. 102 Cong. Rec. 6753, 6760, 6960. The bill was then passed by the Senate, and the Senate amendments were accepted by the House without change. 102 Cong Rec. 6964, 7161, 7165. Thus, the views of the Senate Banking Committee, rejecting the application of State branch banking laws to subsidiaries of bank holding companies, became the views of Congress, and were incorporated into the Bank Holding Company Act of 1956. 102 Cong. Rec. 7941.

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From the foregoing legislative history, it seems to us indisputable that Congress intended applications for the acquisition or establishment of bank-holding-company subsidiaries to be reviewed by the Federal Reserve Board without giving controlling effect to State prohibitions against branch banking.[37] The

[37] We do not mean that the Federal Reserve Board would or should refuse to consider matters of State law when considering applications for acquisitions of State chartered banks. Indeed, the provision for the expression of views of State regulatory officials in such applications facilitates the Board's function in that respect. Sec. 3(b), 12 U.S.C. 1842(b). That provision is, of course, inapplicable to this case, which involves a national bank.

language of the Act embodies this intent. Section 3(c) of the Act provides the five general factors which are to be taken into account in determining whether to approve an application. None of those require reference to State law or restrictions on branch banking. Sec. 3(c), 12 U.S.C. 1842(c), *infra*, pp. 82–83. Section 3(d), 12 U.S.C. 1842(d), to be sure, adds a specific requirement that an application to acquire a bank in another State must be denied if State law does not authorize the acquisition of banks by out-of-State bank holding companies. That section, which contains the only directive referring to State law, is not applicable here; Whitney Holding Corporation has its principal office and place of business in Louisiana. Since the one carefully limited provision of the Bank Holding Company Act which directs the Board to refer to State law is completely inapplicable, and since Congress most deliberately rejected a provision which would have made State branch banking laws applicable to bank holding company operations, the court of appeals erred in holding that the restrictions of Louisiana law as to the location of offices can operate to prohibit the opening of a national bank owned by a holding company.

C. CONGRESS INTENDED TO FREE ALL BANK HOLDING COMPANY SYSTEMS FROM ANY LIMITATIONS IMPOSED BY STATE LAW ON THE LOCATION OF BRANCH OFFICES AND TO IMPOSE, INSTEAD, A WHOLLY FEDERAL SYSTEM OF REGULATION

The court below held that, although not all banks owned or controlled by bank holding companies are subject to branch banking restrictions, some should be

treated as branches. The court emphasized that in the present case the Whitney holding company system was set up for the express purpose of realizing many of the same benefits which are obtained by branch banking while avoiding the statutory regulations as to the location of branch offices. On this basis and on the ground that the Whitney Holding Corporation and its subsidiaries resembled in some ways the central and branch offices of a single bank, the court decided that branch banking provisions determine the permissible location of Whitney-Jefferson Bank. In reaching this conclusion, the court of appeals, we submit, wholly misconceived the federal scheme of regulation.

In enacting the National Bank Act, the Banking Act of 1933, and the Bank Holding Company Act of 1956, Congress, as already observed, defined the rights and obligations consequent upon the adoption of any one of three systems of multiple unit banking. The statutes leave private parties entirely free to choose among the alternatives. Congress was fully aware that many, though not all, of the benefits of multi-unit banking obtainable through branch banking could also be achieved through the operation of a bank holding company system (or a "chain" system of banks owned by the same private parties). It was equally aware that the desire to obtain these benefits without becoming subject to State branch banking laws would encourage some bankers to operate through holding companies. And, knowing all of this, it nonetheless decided that banks should be free to seek and obtain

these benefits of multiple unit banking in exchange for subjecting themselves to the federal system of regulation of bank holding companies. In short, as in any number of other areas of the law, Congress left the private parties free to choose among several alternative forms of operation, each of which was subject to different regulatory provisions.

There is thus no room for an argument that Whitney-Jefferson is "in effect" a branch of Whitney-New Orleans. By operating as a separately chartered national bank, rather than as a branch office of another bank, Whitney-Jefferson becomes subject to a vast range of requirements that are not imposed on branch offices. We have spelled these out in considerable detail (*supra*, pp. 43–45). Beyond this, when the Whitney organization determined to set up a holding company system, instead of some other form of multiple unit banking, it subjected the entire system to the elaborate scheme of federal regulation of bank holding companies—a scheme in no way applicable to branch offices. As a bank holding company system, Whitney is subject to scrutiny of its operations under both the Banking Act of 1933 and the Bank Holding Company Act of 1956. 12 U.S.C. 61, 161, 377, 481; 12 U.S.C. 1844. The subsidiaries are limited in their loans and investments by the 1956 Act (12 U.S.C. 1845). Even to obtain approval of the holding company operation, Whitney was required to follow procedures and to meet requirements which are in many ways far more burdensome and restrictive than the different requirements imposed when the Comptroller

considers the establishment of a new branch. Compare 12 U.S.C. 1842, 1848, with 12 U.S.C. 36 (c) and (e).

We are aware of no decision since the enactment of the Bank Holding Company Act of 1956; aside from the decision below, which holds that a bank is not free to choose between accepting the restrictions of the Banking Act of 1933 on the establishment of branch offices and accepting the different, but surely no less complete scheme of regulation imposed by the 1956 Act on bank holding company operations. In *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937 (C.A. 9), the Ninth Circuit rejected a claim that a subsidiary was subject to the branch banking restrictions, but intimated in dictum that there might be circumstances in which a separately chartered bank owned by a bank holding company might be treated as a branch (306 F. 2d at 943). However, the acquisition in *Billings* was prior to the effective date of the Bank Holding Company Act, with its discreet and comprehensive system of regulation. Moreover, the holding of the case—that the separately chartered bank was not a branch—was based upon factors, such as separate capital structure, loan limits, and books of account, which are written into the governing Federal statutes and are present in the case of every separately chartered bank.

It is thus clear that Congress did not intend that the Federal Reserve Board should analyze holding company acquisitions by reference to the branch banking limitations of State law. It rejected a House bill which had that objective. It adopted, instead, its

own list of criteria which the Federal Reserve Board is to consider in passing upon an acquisition. The Board, however, is not directed to consider either the intimacy of the relationship proposed between a newly acquired subsidiary and its parent holding company or the variant policies reflected in State branch-banking laws. 12 U.S.C. 1842 (c) and (d).

It is only necessary to add, by way of conclusion, that even if a case-by-case analysis of the proposed relationship of a subsidiary to its parent bank were appropriate, there are no facts peculiar to this case which would take Whitney Holding Corporation and Whitney-Jefferson out of the general categories Congress was considering when it decided that branch-banking restrictions should be inapplicable to holding company operations. As we have noted above, Congress knew that bank holding company operations are frequently motivated by the desire to enjoy the benefits of multiple unit operations without incurring the geographical limitations applicable to branch offices. That Whitney Holding Corporation had this end in view neither distinguishes this case nor removes it from the scheme of the Bank Holding Company Act.

The court of appeals also stated that the Whitney management intended to operate Whitney-Jefferson and Whitney-New Orleans "in the same way as if the institutions were one" (R. 475). We agree with Whitney that if intent is material, there was a genuine issue of material fact which could not be decided, as this case was, on summary judgment. But we believe that this consideration was plainly irrelevant. There

is no contention that Whitney Holding Corporation intended to ignore either any of the wide range of requirements imposed on a separately chartered bank, but not on a branch office, or any of the restrictions applicable to bank holding companies but not to branch office operations. We assume, as did Congress, that a primary function of a bank holding company operation is to create centralized control and uniform banking policies for several banking units. But again, that can be no excuse for departing from the scheme of the controlling statute.

The emphasis of the court below on the fact that the banks would have similar or related managements and the same ownership was similarly misconceived; these are the very hallmarks of the great majority of bank holding company operations. The only other factor which the court felt might distinguish this case from the typical holding company operation was the fact that the capital to be used by one subsidiary (Whitney-Jefferson) came from the operations of another subsidiary (Whitney-New Orleans). This, however, is commonplace even in the expansion of a long-established holding company system; management frequently uses the profits the parent has obtained from the operation of its older subsidiaries to acquire or establish a new subsidiary.

In short, the Whitney Holding Corporation operations would differ in no material respect from the type of operations Congress had in mind in passing the Bank Holding Company Act of 1956. The scheme of federal regulation is to allow a bank such as Whitney

to decide for itself whether to accept the regulations and restrictions imposed by federal law on bank holding companies or the alternative schemes of regulation imposed on branch offices or "chain" affiliates. Whitney chose to operate under the Bank Holding Company Act of 1956. This decision freed it from the restrictions imposed by other statutes on other systems of operation.

III

THE LOUISIANA STATUTE PROHIBITING THE OPERATION OF BANK HOLDING COMPANIES DOES NOT PROVIDE A BASIS FOR AFFIRMANCE

Although the decision of the court of appeals was based solely upon the application of the branch banking limitations of State law, respondents, in their briefs in opposition, argued that the decision should be sustained on an alternative ground: the passage of a newly enacted Louisiana statute prohibiting bank holding companies from opening banks in that State. Louisiana Act 275 of 1962 (La. R.S. § 6:1001-1006 (1963 Supp.), *infra*, p. 85) makes it unlawful for any bank holding company "to open for business any bank not now opened for business." This statute, together with Section 7 of the Bank Holding Company Act, 12 U.S.C. 1846 (*infra*, p. 84), which preserved to each State "such powers and jurisdiction which it now has" with regard to banks and bank holding companies, provide the statutory bases for this argument.

In our view the issue of the applicability of a State law prohibiting the opening of a national bank

by a bank holding company, like all other challenges to the acquistion and operation of a bank based upon its proposed ownership by a bank holding company, must be raised and decided in the administrative and judicial proceedings provided by the Bank Holding Company Act. But even if this issue could properly be raised in a district court suit against the Comptroller, the judgment below cannot be defended on that ground. The Louisiana law prohibiting the opening of a new national bank is in flat conflict with the National Bank Act.

A. A DISTRICT SUIT AGAINST THE COMPTROLLER OF THE CURRENCY IS NOT THE PROPER FORUM FOR DETERMINING THE VALIDITY OF A STATE LAW PROHIBITING THE OPENING OF A NATIONAL BANK BY A BANK HOLDING COMPANY

1. We have shown above (pp. 19–40) that the district court was without jurisdiction to entertain this action because the Bank Holding Company Act of 1956 makes the Federal Reserve Board, and, upon judicial review, the appropriate court of appeals the sole tribunals for resolution of all objections, based upon ownership and control, to the acquisition and operation of a national bank by a bank holding company. Each of the considerations advanced there is pertinent here.

The immediate issue is whether Section 7 of the Bank Holding Company Act authorizes the States to prohibit the opening of a national bank within its borders because it is owned by a bank holding company (see, *infra*, pp. 69–74). It is particularly appropriate that a statutory question of this kind should be resolved before the tribunals which Congress chose

to administer and interpret the Bank Holding Company Act, and by the procedure specified by that Act. The Louisiana State Bank Commissioner had both notice and actual knowledge of the proceedings before the Federal Reserve Board, in ample time to make his views known to that body (R. 161). Whether or not his request for reconsideration (see p. 9, *supra*) was a timely presentation of his position, he and the State were bound by the Federal Reserve Board's decision, unless and until it was reversed or vacated by the appropriate court of appeals, under the procedure specified for judicial review. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320; and see *supra*, pp. 29–36.

The fact that Louisiana did not pass the statute on which respondents rely until after the Board had approved the Whitney program in no way detracts from the finality of the Board's determination or the exclusiveness of the judicial remedy provided by the Bank Holding Company Act. If respondents believed that the subsequently enacted Louisiana statute rendered illegal or improper the Whitney proposal to acquire and operate a new bank in Jefferson Parish, they should have presented that issue to the Court of Appeals for the Fifth Circuit. For that court had broad authority, under the Bank Holding Company Act "to affirm, set aside, or modify the order of the Board and *to require the Board to take such action with regard to the matter under review as the court deems proper.*" Emphasis added, Section 9, 12 U.S.C. 1848, *infra*, p. 84. In our view, the subsequent Louisiana statute has no proper role in deter-

mining the lawfulness of the Whitney proposal;[38] but there can, we believe, be little doubt that under the Bank Holding Company Act the proper forum for resolving that issue was the Court of Appeals for the Fifth Circuit, in the judicial review proceedings which the Act specifies. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320.

2. The suit against the Comptroller of the Currency suffers from still another defect: the statute under which the Comptroller proceeds does not authorize him to consider the issue of State law which respondents seek to raise.

The National Bank Act does not authorize the Comptroller to deny a certificate on grounds that the applicant has not complied with State law. His sole function is to ascertain that a proposed bank has complied with the applicable provisions of federal law. In particular, he is directed to (12 U.S.C. 26):

> examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking * * *.

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[38] A duly authorized Federal license or permit necessarily carries with it the authority to act under that license or permit, despite conflicting State laws, whether these be pre-existing or later-enacted. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 338-339; *Seattle* v. *Beezer*, 376 U.S. 224.

It is no part of the Comptroller's functions to certify that the proposed bank has complied with all the provisions of State law, if indeed such provisions can be applied to national banks at all. The federal banking statutes do, on occasion, direct the Comptroller of the Currency to apply, *as a rule of federal law*, various State statutes such as State prohibitions on the location of branch offices. But it is only those State provisions which are incorporated as matters of federal law that the Comptroller is to consider. His certificate is a certificate of compliance with federal law, and that alone (R. 311), and there is no provision of federal law which states that a new bank shall not be certified as in compliance with federal law if its opening is prohibited by a State statute.

It is therefore clear that the Comptroller of the Currency is not authorized, much less required, to determine the applicability of State statutes before certifying compliance with federal law and authorizing the national bank to begin operation. To the extent that State statutes can constitutionally be applied to a national bank or its stockholders, they can now be given effect by the Federal Reserve Board. See pp. 22-26, *supra*. But prior to 1956, State law could only have been applied in direct proceedings by State officials against these parties.[39]

[39] Indeed, even if the Comptroller were to consider the applicability of a particular State statute, his *ex parte* determination would not be binding on the State courts or on the State enforcement officials. The Louisiana statute itself, as the court of appeals noted, purports to outlaw the opening of a national bank even if the Comptroller of the Currency has already issued the certificate of authority to commence the business of banking.

B. A STATE STATUTE PROHIBITING THE OPENING OF A NATIONAL BANK OWNED BY A BANK HOLDING COMPANY IS NOT AUTHORIZED BY THE BANK HOLDING COMPANY ACT, AND IS IN CONFLICT WITH THE NATIONAL BANK ACT

1. The National Bank Act provides for the organization and operation of national banks, which are, of course, instrumentalities of the federal government created by that Act to serve vital federal purposes. *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 558; *Franklin National Bank v. New York*, 347 U.S. 373, 375. Consonant with the need for a sound, uniform national banking system which led to its enactment, the Act confers upon national banks, when organized, all such "powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24, *infra*, pp. 76-77. The Act is a self-contained whole allowing the federal government to create national banks when and as it deems necessary. This federal power has never been subject to the possibly conflicting purposes of State law.

The Act contains its own complete set of requirements for going into business as a national bank. The substantive prerequisites for certification of a national banking association are provided by the statute and it alone. These include, for example, requirements as to the amount of paid-in capital, and the citizenship, residence, and stock ownership of directors. See, generally, 12 U.S.C. 51-67, 71-78, and *supra*, pp. 43-45. The formal procedures to be followed are also fully set out in the National Bank Act. The Act requires that the applicant first become a "national banking association" whose powers are speci-

fied by the statute. Prior to opening, the national banking association must notify the Comptroller that it has "complied with all the provisions of this chapter." The Comptroller is then to conduct an investigation to determine whether the applicant has in fact complied "with all the provisions of this title"—*i.e.*, with all the applicable provisions of federal statutes. If the applicant has, the Comptroller is directed to issue a certificate so stating and authorizing the bank to open for business.

The Comptroller's certificate has always stated only that the applicant has complied "with all provisions of the statutes of the United States"; under the National Bank Act nothing more is required for the applicant to become a national banking association entitled to do business as such within the States. In particular, the applicant is not required to satisfy any additional requirements imposed by State law. As this Court has said, "The National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks'." *Deitrick* v. *Greaney*, 309 U.S. 190, 194; *Cook County Nat. Bank* v. *United States*, 107 U.S. 445, 449.

We believe it is clear, both from the terms and purposes of the National Bank Act and from this Court's precedents, that a State has no power to prohibit the opening of a national bank, or to condition its right to open on compliance with State requirements differing from those imposed by Congress. Indeed, since *McCulloch* v. *Maryland*, 4 Wheat. 316, upheld the right of the federal govern-

ment to maintain an integrated national banking system free of State interference, this Court has regularly held invalid State laws which, though they do not go as far as to deny the right of national banks to operate within a State, would nonetheless impair their ability to perform their federal functions. *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 558–559. See, for example, *Franklin National Bank* v. *New York*, 347 U.S. 373 (State statute prohibiting a national bank from using the word "saving" in its name); *Farmers' and Mechanics' Nat. Bank* v. *Dearing*, 91 U.S. 29, 33–34 (State prohibition of loans above State-prescribed rate of interest); *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283, and *Jennings* v. *U.S. Fidelity & Guaranty Co.*, 294 U.S. 216, 225–226 (State priorities on distribution of assets); *Easton* v. *Iowa*, 188 U.S. 220, 229–231 (State prohibition of accepting deposits when insolvent); *First National Bank* v. *California*, 262 U.S. 366 (provision for escheat to State of unclaimed bank deposits).

Under these precedents, it is clear that Louisiana is without power to deny the federal government the right to open a new national bank within the State's borders. Indeed, it would be difficult to conceive of State legislation which would more effectively interfere with the ability of national banks to discharge their federal duties than a statute which would prevent them from opening their doors. This is precisely what Section 3(5) of Louisiana Act 275 of 1962 purports to do. It forbids a national bank owned by

a bank holding company "to open for business * * * whether or not a charter * * * or certificate * * * has already been issued" permitting it to do so. La. R. S. 6:1003, *infra*, p. 85. If applied to national banks, the State law takes away exactly what is granted by the applicable provisions of the National Bank Act (R. S. §§ 5136, 5168, 5169, 12 U.S.C. 24, 26, and 27), namely the authority to engage in the business of banking. As applied to national banks, the Louisiana statute is therefore invalid; it is in conflict with the National Bank Act and, under the Supremacy Clause of the Federal Constitution, must yield.[40]

2. Unlike the National Bank Act, the Bank Holding Company Act of 1956 does not limit State power. Section 7 provides that the enactment of the Act should "not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." Prior to its enactment a State had power to deny a State charter to a bank because it was owned by a bank holding company (just as it could deny a charter because of ownership by a union or manufacturing corporation). After 1956 the States retained that same power, although the Bank Holding Company Act imposed an additional system of fed-

[40] This is not to suggest that the National Bank Act denies the States power to regulate the operations of State-chartered banks. Thus a State may validly deny a State charter to a bank on the ground that it is owned by a labor union, or manufacturing corporation, although it cannot prohibit the operation of a national bank on these grounds.

eral regulation on bank holding companies and their State bank (or national bank) subsidiaries. Similarly, the 1956 Act did not limit State power over bank holding companies which are State corporations. A State could, prior to 1956, prohibit a local bank holding company from acquiring the stock of more than three State banks or from acquiring the stock of subsidiaries chartered by other States. After 1956, it retained the same power.

Respondents contend that Section 7 of the Bank Holding Company Act did far more than preserve such State authority as existed prior to 1956. They assert that, even if the States lacked power to prohibit the opening of a national bank prior to 1956, Section 7 granted this power whenever the ground of the prohibition was that the national bank was owned by a bank holding company. This contention is rebutted by the legislative history of the section as well as by its careful wording.

An earlier draft of Section 7 had stated that a State could, "within the limits of its proper jurisdictional authority," be more restrictive in regard to the operation of bank holding companies within their borders than the federal authorities or law would be. Sen. Rept. No. 1095, Part 1, 84th Cong., 1st Sess., p. 11. This provision caused concern that the section actually conferred new authority upon the States in regard to national banks generally, and the acquisition of their stocks in particular. In order to make it clear that the bill was intended to confer no new authority upon the States, Section 7 was rewritten

to provide simply that the bill should not be construed as preventing any State from exercising such powers as it had at the time of enactment, or that it may thereafter acquire. In connection with this amendment, the Senate Committee explained:

> In order to clarify the legislative history of Section 7, the committee wishes to emphasize that this section *does not grant any new authority to States over national banks.* The purpose of the section is to preserve to the States *those powers which they now have in our dual banking system.* It is always of uppermost importance in legislation of this nature to preserve the dual system of National and State banks, and section 7 must be viewed in that light. [Emphasis added.][41]

Throughout our history no State has ever had the power to prevent a national bank from opening its doors.[42]

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[41] Sen. Rept. 1095, Part II, 84th Cong., 2d Sess., p. 5; 102 Cong. Rec. 6758.

[42] A different and more difficult question was presented in *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806, appeal dismissed, 359 U.S. 311; and *Opinion of the Justices*, 151 A. 2d 236 (N.H.). There, the State statutes did not prohibit the opening or operation of a federal instrumentality, *i.e.*, a national bank authorized to do business by federal law and holding a federal charter. Instead, they operated upon the holding-company shareholders who were subject to State jurisdiction, forbidding them from acquiring the stock of the national banks. Contrary to the holdings of these cases, we do not believe that the States have power to prohibit the acquisition or retention of shares of a national bank. Be that as it may, as Whitney demonstrates at pp. 48-51 of its brief, that is a quite different issue from the one presented here, and there is no occasion to resolve it in the present litigation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the court of appeals should be reversed.

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APPENDIX A

1. The Constitution of the United States provides in pertinent part, Article VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The National Bank Act provides in pertinent part:

> a. R.S. § 5136, as amended, 12 U.S.C. 24:
>
> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> First. To adopt and use a corporate seal.
>
> Second. To have succession from February 25, 1927, or from the date of its organization if organized after February 25, 1927, until such time as it be dissolved by the act of its shareholders owning two-thirds of its stock, or until its franchise becomes forfeited by reason of violation of law, or until terminated by either a general or special Act of Congress or until its affairs be placed in the hands of a receiver and finally wound up by him.
>
> Third. To make contracts.
>
> Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. * * *

b. R. S. § 5139, as amended, 12 U.S.C. 52:

The capital stock of each association shall be divided into shares of $100 each, or into shares of such less amount as may be provided in the articles of association, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired. * * *

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c. R. S. § 5168, 12 U.S.C. 26:

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

d. R. S. § 5169, 12 U.S.C. 27:

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller

may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title.

e. R. S. § 5155, as amended by Section 23 of the Banking Act of 1933, 12 U.S.C. 36:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing

checks, and drafts, and doing business incident thereto: *Provided,* That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. * * *

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

3. The Bank Holding Company Act of 1956 (Act of May 9, 1956, 70 Stat. 133), provides in pertinent part:

a. Section 2, 12 U.S.C. 1841:

(a) "Bank holding company" means any company (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this Act, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank

holding company is held by trustees; and for the purposes of this Act, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. * * *

* * * * *

(c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

* * * *

b. Section 3, 12 U.S.C. 1842:

(a) Prior approval of Board as necessary; exceptions.

It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841(a) of this title; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. * * *

(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of

the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or a District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing.

(c) Factors governing determination of application for approval.

In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and wel-

fare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

(d) Limitation by State boundaries.

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

* * * * *

c. Section 6, 12 U.S.C. 1845:

(a) From and after the date of enactment of this Act, it shall be unlawful for a bank—

(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company;

(2) to accept the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company, as collateral security for advances made to any person or company: *Provided, however,* That any bank may accept such capital stock, bonds, debentures, or other obligations as se-

curity for debts previously contracted, but such collateral shall not be held for a period of over two years;

(3) to purchase securities, other assets or obligations under repurchase agreement from a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company; and

(4) to make any loan, discount or extension of credit to a bank holding company of which it is a subsidiary or to any other subsidiary of such bank holding company.

d. Section 7, 12 U.S.C. 1846:

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

*   *   *   *   *

e. Section 9, 12 U.S.C. 1848:

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive.

4. Louisiana Act No. 275 of 1962, provides in pertinent part:

§ 2 [La. Rev. Stat., Ch. 12, Title 6, § 1002.] Definitions.

(A) "Bank holding company" means any company, foreign or domestic, including a bank,

(1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of any bank, or

* * * * *

§ 3 [La. Rev. Stat., Ch. 12, Title 6, § 1003.] It shall be unlawful:

(1) for any action to be taken which results in a company or a bank becoming a bank holding company as defined in this Chapter,

(2) for any bank holding company or subsidiary thereof to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company or subsidiary will directly or indirectly own or control more than 25 per centum of the voting shares of such bank;

(3) for any bank holding company or subsidiary thereof to acquire all or substantially all of the assets of a bank; or

(4) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. Notwithstanding the foregoing, this prohibition shall not apply to additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

5. Regulation Y of the Board of Governors of the Federal Reserve System, adopted pursuant to the Bank Holding Company Act, 12 C.F.R. 222, provides in pertinent part:

Section 222.4

(e) *Procedure on applications.* (1) A Federal Reserve Bank receiving an application under this section will retain one copy thereof and will forward all other copies to the Board. If either the applicant or the bank the voting shares or assets of which are sought to be acquired is a national bank or a District bank, the Board will transmit a copy of the application to the Comptroller of the Currency. If either the applicant or the bank the voting shares or assets of which are sought to be acquired is a State bank, the Board will transmit a copy of the application to the bank supervisory authority of the State in which such bank is located.

(2) Following the receipt of an application under this section, the Board will publish in the Federal Register a notice of such receipt, stating the names and addresses of the applicant and the bank or banks involved, indicating the general nature of the proposed transaction, and allowing 30 days (or a shorter period in exceptional circumstances) for the submission of written comments or views. Such comments or views shall be submitted to the Board or to the Federal Reserve Bank for transmission to the Board.

Section 222.7

(a) *Hearings.* In addition to hearings required by the Act (see § 222.4(f) and § 222.5 (b)), a hearing may be ordered by the Board in its discretion with respect to any application or request under this part, either upon its own motion or upon the request of any

party in interest, if the Board deems such hearing to be in the interests of the parties or the public interest. Notice of any hearing required by the act will be published in the Federal Register a reasonable time in advance of the date fixed for the hearing; and any hearings so required will ordinarily be held before trial examiners appointed in accordance with the provisions of the Administrative Procedure Act. All hearings under this part will be conducted in accordance with Part 263 of this chapter (Rules of Practice for Formal Hearings).

(b) *Record of proceedings.* The record in any proceeding under this part upon which an order of the Board is based shall consist of the application or request filed with the Board in connection with such proceeding; any views and recommendations received by the Board from the Comptroller of the Currency or the appropriate State supervisory authority pursuant to section 3(b) of the act; the transcript of any hearing held with respect to such application or request and any report and recommendation made by the trial examiner or hearing officer before whom such hearing was held; any other document or writing relied upon by the Board in making disposition of the matter; and any order of the Board granting or denying the application or request.

(c) *Parties.* A Party to any proceeding under this part shall include any person or agency named or admitted as a party or any person who has filed a request in writing to be admitted as a party and who is entitled as of right to be admitted.

APPENDIX B

(102 Cong. Rec. 6753–6754)

COMPARISION OF BRANCH BANKING AND HOLDING COMPANY OPERATIONS

Branch Banking	Holding Company Operation
Corporate Organization	*Corporation Organization*
One legal entity created under a single charter covering the main office of bank and all its branches.	Two or more separate legal entities each created under a separate charter, one for each bank affiliate.
Stockholders	*Stockholders*
Possess the same stockholders.	Possess different set of stockholders for each affiliate.
Supervision	*Supervision*
Main office of bank and all branches are under supervision of the identical authority as provided by the laws under which organized. Could be either Federal or State laws.	Each affiliate individually is subject to supervision under the laws under which it was separately organized. Some affiliates could be organized under State laws and others under Federal laws.
Main office and all branches also would be subject to supervision of Federal Reserve System if a member or FDIC if insured.	Each affiliate may or may not be subject to supervision of Federal Reserve System or FDIC, depending if such affiliate is a member of the Federal Reserve System or if insured in the FDIC.
	If a holding company controls both national and State member banks and procures a voting permit, then the holding company, as well as all of its affiliated nonmember State banks are subject to examination by and reporting of the Comptroller of the Currency and the Federal Reserve Board.

Branch Banking

Board of Directors

One board of directors.

Holding Company Operation

Board of Directors

A separate board for each affiliate. Statutes commonly impose residence requirement.

For example, national banking laws require that every director, during his whole term of service must be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or district in which the association is located, or within 50 miles of the location of the office of the association for at least 1 year immediately preceding their election, and must be residents of such State or reside within a 50-mile territory of the location of the association during their continuance in office.

Each director must own stock in the association, the aggregate par value of which shall be at least $1,000, unless the capital of the bank does not exceed $25,000, in which case he shall own not less than $500.

Any director ceasing to own the required number of shares, shall vacate his place.

Branch Banking | Holding Company Operation

Management

Amounts to absentee management by officers of main office and board of directors. Officers in charge usually have limited powers.

Management

Affiliates are local institutions managed by local board of directors and officers. May have some supervision and assistance on loan and investment overall policies from holding company.

Branch Banking

Capital structure

Single capital structure for main office and all its branches.

Deposits

All deposits pooled as deposit liability of and available for investment or loans by the bank through main office or any of its branches.

Loan limit

Loan limit based upon capital and surplus applies to the aggregate of all loans made at main office and at all branches. (In case of National Banks the limit is 10 percent of capital and surplus.)

Holding Company Operation

Capital structure

Separate capital structure for each affiliate. Changes in capital are subject to the supervisory authority having jurisdiction over each affiliate.

Deposits

Each affiliate has its own deposits which are its sole liability, and which such affiliate alone can invest or loan from its own office and to its own customers.

Loan limit

Each affiliate has its own loan limit based upon its own capital and surplus. This limit has no relation to capital and surplus of any or all of the other affiliate banks and the holding company.

An affiliate has a special restriction imposed by section 24 of the Federal Reserve Act with respect to loans to other affiliates.

As a result a small branch in an industrial section can handle the loan requirements of large customers up to the total limit permitted of the whole branch banking operation. Consequently the branch usually carries the deposit accounts of such customers.

An affiliate in an industrial section can only handle the loan requirements of a customer up to its individual limits. Consequently substantial deposits of the customer usually go to a larger bank or branch banking operation with larger loan limits.

Loanable funds

Each branch has access to entire capital funds and deposits of the bank (main office) and all branches. Consequently a branch might lend more than the total deposits of that particular branch.

Loanable funds

Each affiliate has available for loans only its own capital funds and deposits. This parallels the situation of independent banks. An affiliate therefore is dependent upon correspondent banks to share excess loans.

Branch Banking

Termination

Branch can be closed at any time if unprofitable. All that is required to close a national bank branch is a resolution of the board of directors or of the stockholders, if branch is described in articles of association, and the transmittal to the comptroller of such resolution together with certificate authorizing the branch.

Holding Company Operation

Termination

Requires voluntary liquidation of affiliate according to provisions of the State or Federal laws under which it was chartered.

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